BRIEF.

In Support of the Petition for Certiorari.

The index precedes the petition for certiorari.

I.

The Reports of the Decisions Below.

The appellate court's opinion is reported as *Denny* v. *Fort Recovery Banking Company,* 1943, 135 Fed. (2d) 184.

There were three opinions of the district court which appear in the record at: R. 29 to 32; R. 45 to 47 and at R. 55. Of these only the first, that at R. 29 to 32, has been reported. It is *Denney* v. *Fort Recovery Banking Company,* 1942, 47 Fed. Supp. 36.

II.

Grounds on Which the Jurisdiction of this Court is Invoked.

The statutory basis of the jurisdiction of this court has been stated at page 6 of the preceding petition.

The grounds relied upon for invoking the jurisdiction of this court have been stated at pages 8 to 13 of the preceding petition. In recapitulation they are:

That the district court unlawfully accelerated the termination of the three year moratorium under Section 75(s)(3) by granting a permit to the farmer debtor to redeem short of three years and then ordering his farm sold for failure to so redeem.

That the district court in violation of Section 75(s)(3) ordered the farmer debtor's farm sold for the sole reason that he had not redeemed it at a time before the expiration of the statutory moratorium period—said time having been set by the district court by granting a permit to so redeem with a proviso that if he did not do so the farm would be sold.

That the district court violated Section 75(s)(3) in holding that a farmer debtor by consenting to the entry of an order permitting him to redeem before the three year moratorium had run, waived the statutory provision that only the farmer debtor can shorten the three year moratorium by paying into court the value of his farm.

That the district court violated the statutory provisions in Sections 38 and 39 of the Bankruptcy Act, 11 U.S.C. 66 and 67, which provide that orders made by referees are always subject to review by the judge and that referees shall promptly prepare and transmit certificates on review of petitions for review filed by persons aggrieved at such orders.

That the district court violated Section 75(s)(3) in refusing to grant the application of the farmer debtor for the full three year moratorium after he had found it impossible to pay into court the value of his farm before the three years had run as he had believed and informed the court he could do.

That important questions of procedure under Section 75 of the Bankruptcy Act, 11 U.S.C. 203, are involved.

That important questions of procedure under Sections 38 and 39 of the bankruptcy Act, 11 U.S.C. 66 and 67, are also involved.

That the orders of the lower courts conflict with Section 75(s)(3) of the Bankruptcy Act, 11 U.S.C. 203, and with Sections 38 and 39 of the Bankruptcy Act, 11 U.S.C. 66 and 67.

That the orders of the lower courts are in conflict with the decision of this court in *Adair* v. *Bank,* 1938, 303 U.S. 350, at page 355 where it was held in adjudicating Section 75(s) that:

> . . . "Further opportunity for rehabilitation is afforded the debtor, through provisions enabling him to retain possession under conditions favorable to its ultimate redemption by him."

That they conflict with the decision of this court in *John Hancock* v. *Bartels,* 1939, 308 U.S. 180, where the district court denied a moratorium to the farmer debtor because there was "no hope or expectation" of ultimate rehabilitation and this court sustained a reversal of it. Here the district court granted "permission" to the farmer debtor to redeem at a fixed date before the end of the moratorium and then ordered his farm sold solely because (quoting the final order) "the time for redemption has expired, and said debtor has failed to so redeem said lands." R. 37, folio 35.

That they also are in conflict with the decision of this court in *Borchard* v. *California Bank,* 1940, 310 U.S. 311, reversing an order of the district court which found "the debtors had had several years within which to arrange an adjustment" and for that reason ordered the property sold before any moratorium had run. In this case the district court ordered the property sold, upon the ground that "said debtor has failed to so redeem" as prematurely "permitted" by the court prior to the expiration

of the statutory three year moratorium. In the *Borchard* case this court, at pages 316 and 317, said " 'The scheme of the statute [Section 75(s)] is designed to provide an orderly procedure' . . . That orderly procedure includes . . . the entry of a stay which will **assure** him of his possession for three years" . . .

They also conflict with the decision of this court in *Wright* v. *Union Central,* 1940, 311 U.S. 273, at page 281, where in referring to the termination of a farmer debtor proceeding under Section 75(s)(3), it was held that "such termination can be affected only pursuant to the **precise procedure** which Congress has provided."

They also conflict with the decision of this court in *Wright* v. *Logan,* 1942, 315 U.S. 139, where the farmer debtor proceeding had lain dormant for nearly five years because of the inaction of the bankruptcy court and when the farmer debtors filed an amended petition under Section 75(s) the court denied it and terminated the case. This court reversed the lower courts, saying, at page 181:

> "Section 75(s) does not by its language condition a farmer's right to adjudication upon the diligence with which he has sought to obtain composition or extension under subsections (a) to (r). It 'applies explicitly to a case of a farmer who has failed to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a proposal for a composition or an extension of time to pay his debts.' *John Hancock Ins. Co.* v. *Bartels,* 208 U.S. 180, 184. That was the situation of the farmers here. And 'the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress . . . lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act.' *Wright* v. *Union Central Ins. Co.,* 311 U.S. 273, 279. Farmers

cannot be deprived of the benefits of the Act because a court may believe that they have received the equivalent of what it prescribes. *Cf. Borchard* v. *California Bank,* 310 U.S. 311. We think the *Bartels,* [308 U.S. 180], *Wright,* [311 U.S. 273], and *Borchard* [310 U.S. 311], cases control our conclusion here, and that the court below was in error in dismissing the applications for adjudication under 75(s)."

In the *Logan* case, as in this case, the lack of diligence was that of the court.

They conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Bankers* v. *Havel,* (1942), CCA 8, 129 Fed. (2d) 106, where that court said in the last paragraph:

"That the statute assures to the debtor possession for three years from the date of the order upon the conditions mentioned in the Act is no longer open to debate" citing the decisions of this court in *Borchard* v. *California Bank,* 1940, 310 U.S. 311; *John Hancock* v. *Bartels,* 1939, 308 U.S. 180; and *Wright* v. *Union Central,* 1940, 311 U.S. 273.

They are also, in the same respect in conflict with the decision of the United States District Court for the Southern District of Iowa in *In re McClenahan,* 1941, 41 Fed. Supp. 694.

They further conflict with the decision of the Eighth Circuit in *Rafert* v. *Conway,* 1941, CCA 8, 119 Fed. (2d) 102, where it was held that when a farmer debtor proceeding has passed under Section 75(s) there is no power to deprive the farmer debtor of his lands except in strict compliance with the statute liberally construed so as to effectuate the legislative intent.

They are also in further conflict with the decision of the Ninth Circuit in *Corey* v. *Blake,* decided May 24, 1943, and presently published in the July 9, 1943, issue of the Bankruptcy Law Service as paragraph 54419. Reversing the District Court and the conciliation commissioner below that Circuit Court of Appeals held that the orderly procedure of the statute which was referred to by this court in the *Bartels* and *Borchard* cases was not followed by the bankruptcy court when it based its proceedings under Section 75(s) upon a stipulation by the parties.

III.

Statement of the Case.

The application for liquidation from which this petition for certiorari stems is one of a series of eight such applications made by the respondent seeking to end the farmer debtor proceeding. The petition under Section 75(a) to (r) was filed March 31, 1937. The first "motion to dismiss" was filed on May 6, 1937. The proceeding lay practically dormant from May 28, 1937, when the second such application was filed, until November 15, 1938, when the mandate of the appellate court reversing an order of dismissal was received in the district court. *Denney* v. *Fort Recovery,* 1938, 99 Fed. (2d) 712. Two weeks later, on December 1, 1938, the respondent resumed its attack by an "Amended Petition to Dismiss." During the rest of 1938, all of 1939, and nearly six months of 1940, the proceeding again lay dormant. It was not until nearly three years after the petition was filed that an order of adjudication was entered. On June 15, 1940, the clerk's docket recites:

> "All petitions to dismiss withdrawn by creditor. Debtor ordered adjudicated as bankrupt. Cause ordered referred to conciliation commissioner."

For the outline of the foregoing history, as entered in the clerk's docket and in the conciliation commissioner's docket, see:

(1) R. 62, Clerk's docket entry of May 6, 1937.
(2) R. 70, top of page, Conciliation Commissioner's docket entry of May 28, 1937.
(3) R. 62, Clerk's docket entry of June 9, 1937.
(4) R. 63, Clerk's docket entry of September 3, 1938.
(5) R. 63, Clerk's docket entry of November 15, 1938.
(6) R. 64, Clerk's docket entry of June 8, 1940.
R. 64, Clerk's docket entry of June 15, 1940.
R. 64, Clerk's docket entry of June 20, 1940.
(7) R. 64, Clerk's docket entry of September 18, 1941.
(8) R. 65, Clerk's docket entry of September 18, 1942. 1942.

A rather general statement of the case relative to the specific issues raised here has been related under the heading "The Subject Matter" at pages 3 to 5 of the proceeding Petition for Certiorari.

Somewhat tersely stated the facts relating to the points involved are:

(1) The judge of the bankruptcy court granted permission to the farmer debtor to redeem his farm for a stated sum to be paid by a named date prior to the expiration of the three year stay period. Four months later the court put on an entry approved by the mortgage holder but not by the farmer debtor. When the farmer debtor failed to pay the sum into court on the day named the court ordered the farm sold upon the ground that the time for redemption had expired. R. 64, clerk's docket entry of February 17, 1942. R. 8. R. 37, folio 35. It should be said that the provision "on default thereof, said land to be sold" in the en-

try of June 17, at R. 8, is not in the memorandum of the permission to redeem which was put on the clerk's docket on February 17 when the permission was granted.

(2) The conciliation commissioner entered an unlawful order for the payment of rent over a period of seven years beginning more than three years before and ending more than three years after the entry of the order. A petition for review of that order was duly filed but was never certified to the judge for review. R. 41. R. 42, last paragraph preceding folio 40.

(3) Without being set down for hearing and without any hearing the court granted an application by the respondent mortgage-holder to sell the farmer debtor's farm. R. 66, entries of September 18, 1942, to October 7, 1942, inclusive.

IV.

Specification of Errors.

1.

Denial of the farmer debtor's application for the full three year stay and for an opportunity to redeem as provided in Section 75.

2.

Holding that permission granted by the bankruptcy court to the farmer debtor to redeem his farm, at a stated valuation, before the expiration of the statutory stay under Section 75 required him to do so or have his farm sold upon the ground that his time for redemption has expired.

3.

Holding that if a farmer debtor fails to pay into court the valuation of his farm before the three year stay provided in Section 75 has expired his farm should be sold.

4.

Holding that the statutory provision in Section 75(s)(3), that at the end of three years of the statutory stay a farmer may pay into court the value of his farm and so redeem it, may be shortened by issuing permission to him to redeem it by a named date short of such three years, and holding that his time for redemption has expired if he does not pay into court such value by such date.

5.

Holding that if a farmer debtor requests permission to redeem his farm under Section 75 by a named date prior to expiration of the three year stay therein provided, his period within which to redeem expires on said date.

6.

Holding that if a farmer consents to an order permitting him to redeem his farm prior to the expiration of the three year stay period under Section 75, he is thereby prohibited from redeeming it at the end of the three year period.

7.

Amending that part of Section 75(s)(3) which reads:

"**At the end of three years,** or prior thereto, the debtor may pay into court the amount of the appraisal

of the property . . . and thereupon the court shall . . . turn over full possession and title" . . .

as if it read:

"At the end of three years, or prior thereto, or **within such shorter time as the court may fix,** the debtor may pay into court the amount of the appraisal of the property, and thereupon the court shall . . . turn over full possession and title and **in default of such payment within such shorter time fixed by the court, the property may be ordered sold.**"

8.

Ordering the farmer debtor's farm liquidated for the reason that he requested and the court granted permission to redeem his farm before the three year stay expired and he did not do so by the date named by the court.

9.

Holding that the farmer debtor's time for redemption had expired, short of the three year stay period, because the court granted permission to the farmer debtor to redeem his farm prior to the expiration of such three year stay period and he did not do so.

10.

Violating Section 75(s)(3) which assures to the farmer debtor the right to redeem his farm up to the end of his three year stay period.

11.

Holding that the farmer debtor had violated an order of the court made pursuant to Section 75 when such order

granted permission to the farmer debtor to redeem his farm before the expiration of the three year stay period.

12.

Holding that the farmer debtor had failed to comply with the provisions of Section 75 because he did not redeem his farm by a date named by the court before the expiration of the three year stay.

13.

Holding that if a farmer debtor waives a right to reappraisment as provided in Section 75(s)(3) he must subsequently redeem his farm at its appraised value before the expiration of his three year stay.

14.

The failure to review the conciliation commissioner's order of September 4, 1940, pursuant to the farmer debtor's petition for review which was properly filed with the conciliation commissioner but not certified to the clerk of the court.

15.

Finding that counsel for the farmer debtor mailed to the farmer debtor to be filed with the conciliation commissioner a petition for review and assignment of errors pertaining to the conciliation commissioner's order of September 4, 1940, and that the farmer debtor failed and neglected to file them with the conciliation commissioner.

16.

Finding that the farmer debtor did not file a petition for review and assignment of errors with the conciliation commissioner seeking review of the conciliation commissioner's order of September 4, 1940.

17.

Holding the farmer debtor guilty of contumacious conduct because he stated to the court that he filed with the conciliation commissioner his petition for review of the conciliation commissioner's order of September 4, 1940.

18.

Finding that the farmer debtor brazenly asserted that his counsel had filed with the conciliation commissioner his petition for review of the conciliation commissioner's order of September 4, 1940.

19.

Finding that the farmer debtor abandoned his farm.

20.

Finding that the farmer debtor approved the order entered June 17, 1942.

21.

Granting the application of the respondent to have the farmer debtor's farm liquidated without any hearing of such application.

V.

Summary of the Argument.

1.

The three year stay under Section 75(s) is as a clock that is wound to run for three years. Farmer debtors are guaranteed by the statute and they have been assured by this court that they have three years within which to redeem their farms.

So far as pertinent Section 75(s)(3) reads:

> "**At the end of three years, or prior thereto the debtor may pay into court** the amount of the appraisal of the property . . . and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor:" . . .

Borchard v. *California,* 1940, 310 U. S. 311, at pages 316 and 317:

> "The scheme of the statute [Section 75(s)] is designed to provide an orderly procedure" . . .
>
> "That orderly procedure includes . . . the entry of a stay which will **assure** him of his possession for three years" . . .

Redemption procedure can terminate the proceeding in only two ways, that is either:

(1) "**At the end of three years** . . . the debtor may pay into court" the value of his farm,

(2) . . . **or prior thereto** the debtor may pay into court" the value of his farm. The farmer debtor alone can stop the clock by redemption, and that he may do only if he "**pay into court.**"

The bankruptcy court may not inject a third method by a judicial amendment of the statute. The court below attempted to do so by giving the farmer debtor **permission** to pay into court the value of his farm prior to end of three years and then ordering his farm liquidated when he did not do so, on the ground that "the time for redemption has expired, and said debtor has failed to so redeem said lands" (The words here quoted are from the final order of the court at R. 37, folio 35.)

The mere fact that the farmer debtor consented to such "permission" does not shorten the stay if he does not "pay into court" the value of his property. Neither his consent nor such "permission" stops the three year clock. The farmer debtor consented to no more than that reappraisement be waived and that he have permission to redeem before the three year stay expired. He did not, as added in the formal entry, consent that "On default thereof, said land to be sold". See the clerk's docket entry of February 17, 1942, at R. 64, and the entry of June 17, 1942, at R. 8. As mute evidence that the entry of June 17 was not submitted to the farmer debtor there is a blank space for his approval.

2.

Under the bankruptcy statutes a person who is aggrieved by an order of a referee is entitled to have the order reviewed by the judge if he files with the referee a petition for review of such order. The failure of the referee to prepare promptly and transmit his certificate on the petition for review does not deprive the aggrieved person of his right to a review.

The applicable portions of the Bankruptcy Act read thus:

Section 38: "Referees are hereby invested **subject always to a review by the judge,** with jurisdiction" to exercise certain enumerated powers.

Section 39(a): **Referees shall . . . prepare promptly and transmit to the clerks certificates on petitions for review** of orders made by them" . . .

(c) "A person aggrieved by an order of a referee may . . . file with the referee a petition for review of such order by a judge" . . .

Although the farmer debtor duly filed with the conciliation commissioner his petition for review, it was never certified to the judge.

3.

The farmer debtor's constitutional right to due process of law was violated by the order of sale which was entered without any hearing upon the issues raised by the respondent's application therefor and the farmer debtor's answer thereto.

The application of the respondent, as mortgage holder, for the appointment of a trustee and for an order to sell the farmer debtor's farm was filed September 18, 1942. R. 15 to 19. An answer creating distinct issues of fact was filed by the farmer debtor September 25, 1942. R. 20 to 23. This application and the answer to it were not set down for hearing and were never heard. R. 65, folio 72, entries of September 18, 1942 to October 7, 1942, inclusive.

VI.

ARGUMENT.

1.

The statute prescribes concisely how a farmer debtor proceeding is terminated by redemption. It is too explicit to admit of any doubt. It reads:

> "At the end of three years, or prior thereto the debtor may **pay into court** the amount of the appraisal of the property . . . and thereupon the court shall, by an order turn over full possession and title of said property, free and clear of encumbrances to the debtor:" . . .

The statutory prescription is clear. The farmer debtor does not by any act of his own less than the requirement that he **"pay into court"** shorten the stay period. He may **think** he will be able to "pay into court" before the expiration of three years but that is not **payment into court.** Even though the court put on an entry that he **"be permitted to redeem** . . . for . . . $8680, to be paid into court **on or before" the end of the three years** (R. 8) it is not **payment into court** and his three year stay is not thereby terminated.

Let it be perfectly clear that the denial by the bankruptcy court of the three year stay was founded upon the single ground that the farmer debtor failed to redeem within the time he was to be **"permitted to redeem".** The order of sale reads: "The court finds that the **time for redemption has expired and said debtor has failed to so redeem** said lands" by August 17, 1942. This was the date

named by the court in its order of June 17, 1942. See the order at R. 36 and 37. The words just quoted from the order appear in the first sentence at folio 35 of R. 37.

The Appellate Court based its affirmance of the bankruptcy court's order upon the same ground. The opinion of that court at R. 94, second and third full paragraphs from the top of the page, reads: "Since the appellant failed to redeem the property by August 17, 1942, the appellee on September 18, 1942, filed its petition for an order of sale and for the appointment of a trustee therefor. . . . On November 21, 1942, after a hearing, the court sustained the petition of the appellee, entered an order for sale and appointed a trustee." (Although it relates to the third point of the Argument in this case which has been stated in the Summary of the Argument at page 27 and is discussed at page 29 of this brief, it probably should be said here that the statement in the portion just quoted from the Appellate Court's opinion that the application for an order of sale and appointment of a trustee was granted "after a hearing" is in error. That application was never set down for hearing and it was never heard.)

The order of June 17, 1942, which named August 17, 1942, two months ahead, as the final date for redemption by permission of the court appears at R. 8. It appears there without approval by the farmer debtor as the original appears in the files of the court. The designation of the record particularly directed the clerk to include this order exactly as it appears.

> Appellant's Designation 11: "The order of the judge entered June 17, 1942. (The clerk will note that said order is *not* approved by the farmer debtor and *is* approved by the appellee and the clerk will please include the matter which will indicate the same.)" R. 49, Designation 11.

It is equally true that the farmer debtor orally consented that he be **"permitted to redeem"**. See entry on the Clerk's docket of February 17, 1942, at R. 64. Neither the consent nor the permission expressed anything more than the statutory provision that "At the end of three years, or prior thereto, debtor **may** pay into court". Section 75(s)(3). The formal entry of four months later on June 17, 1942, R. 8, added the words "On default thereof, said land to be sold" to which he did not consent. He did not approve the entry at R. 8.

This is not the first instance where it has been attempted to oust the farmer debtor from his statutory three year stay by some **substituted procedure.**

A subject very closely akin to this was before the court in *Borchard* v. *California Bank,* 1940, 310 U. S. 311, where for four successive crop seasons the farmer debtors entered into **written agreements** with the mortgage holder which were **embodied in court orders** whereby instead of paying rental into court, a sum of money out of each crop was paid by the farmer debtors directly to the mortgage holder.

At page 317 this Court said:

> "Instead of prosecuting the cause before the Conciliation commissioner pursuant to the debtors' petition, the bank resorted to **a procedure not contemplated by the statute,** evidently on the theory that it could obtain some advantage by that course."

We digress here momentarily to show the parallel in this *Denney* case. The Appellate Court's opinion at the

paragraph beginning at the bottom of R. 94, and running over to the top of R. 95, said:

> . . . "The statute has prescribed a certain procedure that must be followed **if the farmer debtor insists upon it.** It is not for the courts to point out or explore any short cuts. The court cannot *force* [the emphasis is that of the court] the farmer debtor to accept any procedure except that laid down in the statute. That is not to say that the farmer debtor may not come into open court with his attorney and understandingly and voluntarily agree to another procedure. He may deem it to his advantage to accept another procedure. This he is free to do, unless the farmer-debtor is to be considered a ward of the court, which view we do not accept. This being so, the appellant may waive a procedure which he may otherwise insist upon."

Also in the paragraph at the middle of R. 95 the Appellate Court said in this *Denney* case:

> "We think the appellant voluntarily, knowingly and advisedly consented to a procedure different from that laid down in the statute, and his conduct in this regard amounted to a waiver of his right to thereafter insist upon the letter of the statute."

It seems clear that the Borchards also "voluntarily, knowingly and advisedly consented to a procedure different from that laid down in the statute". They entered into **written stipulations** with the mortgage holder and the bankruptcy court issued orders based upon those written stipulations. This court disapproved and reversed the procedure in the *Borchard* case which that in this *Denney* case parallels.

We continue with the opinion in the *Borchard* case.

This Court said further at pages 316 and 317 of the *Borchard* opinion:

> "We are of the opinion that the action of the District Court in permitting the creditor to proceed to a sale for the enforcement of its liens at this stage of the proceeding was contrary to the provisions of Section 75(s). That this is so is made plain by our decisions in *Wright* v. *Vinton Branch of Mountain Trust Bank,* [300 U. S. 440]; and *John Hancock Ins. Co.* v. *Bartels,* 300 U. S. 180. As was said in the latter case (P. 187):
>
> > 'The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved.'
>
> That orderly procedure includes an application by the debtor, such as was made in the present case, for an appraisal of the property, an order that the debtor remain in possession upon terms fair and equitable to him and to secured creditors, and the entry of **a stay which will assure him of his possession for three years** from the date of the order, upon the conditions mentioned in the Act."

In *John Hancock* v. *Bartels,* 1939, 308 U. S. 180, one of the grounds for terminating the proceeding was, as in this *Denney* case, that Bartels could not redeem. This Court said at:

> Pages 183 and 184: "We think that the District Judge failed to follow the **mandate of the statute** and that the Circuit Court of Appeals was right in reversing the judgment and ordering the proceeding to be reinstated.

Subsection (s) of Section 75 as amended by the Act of August 25, 1935, prescribes a **definite course of procedure.**"

Page 186: "Under paragraph (2), if there has been compliance with the statutory conditions, the court is directed to **stay all proceedings against the debtor or his property for a period of three years, and during that time the debtor may retain possession** of all or part of his property subject to the court's control, provided he pays a reasonable rental semi-annually."

Also at page 186: "**Then it is provided, in paragraph (3), that at the end of the three year period, or at any time before that, the debtor may pay into court the appraised value of the property . . .**" "**In that way, by the order of the court, the debtor may regain full possession and title of such property, . . .**"

Page 187: "**The scheme of the statute is designed to provide an orderly procedure** so as to give whatever relief may be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved. See *Wright* v. *Vinton Branch, supra; Adair* v. *Bank of America Association,* 303 U. S. 250, 354-357; *Wright* v. *Union Central Life Ins. Co.,* 304 U. S. 502, 516, 517."

In *Wright* v. *Union Central,* 1940, 311 U. S. 273, the farmer debtor had not paid rent as ordered by the court, to which rental order no petition for review was ever filed. The District Court ordered a sale of the farm and on appeal the order of sale was affirmed. The Appellate Court, relying upon Section 75(s)(3) and the decision of this court in *Wright* v. *Vinton,* 1937, 300 U. S. 440, said

the facts not only authorized the order of sale by the District Court but "made such action imperative." See the opinion of the Appellate Court in *Wright* v. *Union Central,* 1939, (CCA 7), 108 Fed. (2d) 361. The District Court which issued the order of sale in that case and the Appellate Court which affirmed it are the same courts which issued the order of sale and affirmed it in this case.

This court reversed the lower courts and said at page 278:

> "This Act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt. *Wright* v. *Union Central Life Ins. Co.,* [304 U. S. 502]; *John Hancock Mutual Life Ins. Co.* v. *Bartels,* 308 U. S. 180; *Kalb* v. *Feuerstein,* 308 U. S. 433. Safeguards were provided to protect the rights of secured creditors, through the proceedings, to the extent of the value of the property. *John Hancock Mutual Life Ins. Co.* v. *Bartels,* [308 U. S. 180], at pages 186-187; *Borchard* v. *California Bank,* [310 U. S. 311] at page 317. There is no constitutional claim of the creditor to more than that. And so long as that right is protected the creditor certainly is in no position to insist that doubts or ambiguities in the Act be reserved in its favor and against the debtor. Rather, **the Act must be liberally construed to give the debtor the full measure** of the relief afforded by Congress (*John Hancock Mutual Life Ins. Co.* v. *Bartels,* [308 U. S. 180]; *Kalb* v. *Feuerstein,* [308 U. S. 433]); **lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act."**

Page 281: **"And to hold that the court has the discretion to deny or to grant the debtor's right** to redeem at the reappraised value or at the value fixed by the court, dependent on general equitable consid-

erations, **would be to rewrite the Act, so as to vest in the court a power which Congress did not plainly delegate.**"

This *Denney* case now before the Court is also in essence a replica of *Wright* v. *Logan,* 1940, 315 U. S. 139. In that case the District Court **had the parties to agree upon the amount due which was embodied in an order that unless redemption at that sum was accomplished by a fixed date the mortgage holders might proceed with their sale in foreclosure.** When the farmer debtors failed to pay the redemption price at the time named by the court the case was dismissed. The Circuit Court of Appeals for the Seventh Circuit, when the case was before it in *Wright* v. *Logan,* 1941, 119 Fed. (2d) 354, sustained the District Court, saying:

> "We are in complete accord with the decision of the District Court that he was without right or power to deprive appellees [the mortgage holders], of their rights any longer" . . . Certainly it [Section 75] can not be construed to permit him to allow his proceeding to lie dormant for years, and then, **after expressly promising to surrender possession of the premises involved if he does not pay up within a specified time,** invoke its benefits."

We again digress to compare the *Denney* opinion with that in the *Wright* v. *Logan* case in the Seventh Circuit opinion. It will be noted that the Appellate Court there as here based its affirmance on a promise or consent obtained from the farmer debtors. In this *Denney* case the Seventh Circuit followed practically the same thought in

saying in its opinion at the bottom of R. 94 and the top of R. 95:

> . . . "The court cannot *force* [this is the court's emphasis] the farmer debtor to accept any procedure except that laid down in the statute. That is not to say that the farmer debtor may not come into open court with his attorney and understandingly and voluntarily agree to another procedure. He may deem it to his advantage to accept another procedure. This he is free to do, unless the farmer debtor is to be considered a ward of the court, which view we do not accept. This being so, the appellant may waive a procedure which he may otherwise insist upon."

And at the middle of the opinion at R. 95 it is said:

> "We think the appellant voluntarily, knowingly and advisedly consented to a procedure different from that laid down in the statute, and his conduct in this regard amounted to a waiver of his right to thereafter insist upon the letter of the statute."

Returning now to this Court's opinion in *Wright* v. *Logan* which is being discussed, this Court further said:

> Page 142: **"Farmers cannot be deprived of the benefits of the Act because a court may believe that they have received the equivalent of what it prescribes.** *Cf. Borchard* v. *California Bank,* 310 U. S. 311. We think the *Bartels* [308 U. S. 180], *Wright,* [311 U. S. 273], and *Borchard* [130 U. S. 311] cases control our conclusion here, and that the court below was in error to dismiss the applications for adjudication under Section 75(s)."

The statute, which is the sole guide, does not authorize the sell-out of a farmer debtor because he did not pay into court prior to the end of three years the amount necessary to redeem his property. **Permission by the court to do so,**

or a request by the farmer debtor for permission to do so, does not meet the terms of the statute.

The purpose of the statute to assure **ultimate redemption** was also emphasized in *Adair* v. *Bank,* 1938, 303 U. S. 350, at page 355, where it was held in adjudicating Section 75(s) that:

> . . . "further opportunity for rehabilitation is afforded the debtor, through provisions **enabling him to retain possession** under conditions favorable to its ultimate redemption by him."

In *Bankers* v. *Havel,* 1942, CCA 8, 129 Fed. (2d) 106, that court said in the last paragraph:

> "**That the statute assures to the debtor possession for three years** from the date of the order upon the conditions mentioned in the Act **is no longer open to debate**" citing the decisions of this court in *Borchard* v. *California Bank,* 1940, 310 U. S. 311; *John Hancock* v. *Bartels,* 1939, 308 U. S. 180; and *Wright* v. *Union Central,* 1940, 311 U. S. 273.

To the same effect is the decision of the United States District Court for the Southern District of Iowa in *In re McClenahan,* 1941, 41 Fed. Supp. 694.

In *Rafert* v. *Conway,* 1941, CCA 8, 119 Fed. (2d) 102, the court said:

> "The mortgaged lands were then within the bankruptcy jurisdiction and there was no power to deprive the farmer of them except in strict compliance with the provisions of Section 75 sub. (s) liberally construed to effectuate the legislative intent".

In *Corey* v. *Blake,* a decision of the Ninth Circuit Court, which was anounced May 24, 1943, and published in the

Bankruptcy Law Service on July 9, 1943, it was said, in reversing the District Court and the conciliation commissioner below:

> "Thus, instead of following the orderly procedure which the statute was designed to provide (*John Hancock Mutual Life Ins. Co.* v. *Bartels, supra; Borchard* v. *California Bank, supra*), the commissioner followed a disorderly and unauthorized procedure. *Cf. Borchard* v. *California Bank, supra.* In the course of, and as part of, that disorderly and unauthorized procedure, the commissioner made his order of December 30, 1938, his order of January 4, 1939, and his order of April 18, 1942."

The foregoing demonstrates (1) that the decision of the Circuit Court of Appeals is at variance with the statute—Section 75(s)(3). (2) It is also in conflict with the decision of two other Circuit Courts of Appeals. (3) The question of federal law which is involved has not been, but should be, settled by this court. (4) The decision is in conflict with the applicable decisions of this court which have been cited and others that have not been mentioned. One of the decisions of this court with which the decision below conflicts was a reversal of a Seventh Circuit decision which was, in substance, adhered to in the instant order to which the application for certiorari is directed. *Wright* v. *Logan*, 1940, 315 U. S. 139.

2.

When a petition for review is duly filed with a referee, it is his duty to certify to the judge the question for review. A failure by the officer of the court to do so may not be visited upon the petitioner.

The applicable portions of the Bankruptcy Act are here repeated:

A conciliation commissioner is a referee. Section 75(s)(4): "The conciliation commissioner . . . shall continue to act, and act as referee" . . .

Section 38: "Referees are hereby invested subject always to a review by the judge, with jurisdiction" to exercise certain enumerated powers.

Section 39(a): "Referees shall . . . prepare promptly and transmit to the clerks certificates on petitions for review of orders made by them" . . .

(c): "A person aggrieved by an order of a referee may . . . file with the referee a petition for review of such order by a judge" . . .

That a petition for review was properly filed before the concilation commissioner is indubitably demonstrated by the letter of transmittal from Honorable Samuel E. Cook, counsel for the farmer debtor, to the conciliation commissioner, Honorable Byron G. Jenkins, and the acknowledgment of its receipt in the conciliation commissioner's answer to Mr. Cook in which he said "We have your application for appeal, which will be certified to the District Court in a day or two". R. 41 and 42.

The farmer debtor stated fully the facts concerning the filing of his petition for review with the conciliation commissioner in his application subsequently made directly to the district court which appears at R. 9 to 15. He stated them as follows:

"Your petitioner being aggrieved by said order because that portion thereof relating to rental, because he believed and still believes the same to be void, he instructed his counsel to prepare and file the necessary papers to obtain a review of said order of September 4, 1940, by the Judge of this court.

Said counsel complied with said instructions by

> filing with the conciliation commissioner a petition for review, an assignment of errors and a brief." R. 10, last two paragraphs.

To visit upon the farmer debtor the failure of the conciliation commissioner to comply with the law is the negation of all law. This theory was repudiated by this Court in *Borchard* v. *California Bank,* (1940), 310 U. S. 311, when for four years the court failed to comply with the statutory requirement that a stay order be issued. It was repudiated in *Wright* v. *Logan,* (1941), 315 U. S. 139, where the court kept a proceeding before a conciliation commissioner for several years under Section 75(a) to (r).

For his statements that he had instructed his counsel to file a petition for review and that his counsel had filed it, the judge of the district court characterized the statements of the farmer debtor as "contumacious conduct," R. 30, bottom of page to R. 31, top of page. (This term had been used by this Supreme Court in *Wright* v. *Union Central,* (1940), 311 U. S. 273, 280, as justification for selling out a farmer debtor prior to the end of his three years.) Later, when the conciliation commissioner's letter acknowledging receipt of the petition for review from counsel for the farmer debtor was called to the judge's attention, the judge said:

> "If the review procedure was followed, **it was of course the duty of the Conciliation Commissioner to send the record up for review.** It seems from the supplement to the petition that this matter was handled by correspondence between the attorney for the farmer debtor and the commissioner, a very unsatisfactory way to conduct proceedings of this or any other kind of action in court."

Is it too much to say that the vast majority of proceed-

ings in all federal courts, District, Appellate, and Supreme, are conducted by mail? At any rate, the statutes and the Rules of Civil Procedure so provide.

As this petition and brief are devoted solely to showing that a petition for review should be granted many subjects of discussion on the merits are wholly omitted. However it should probably be said here that the order of September 4, 1940, setting rental for seven years, in addition to being unlawful, was so confused and inconsistent that it was utterly impossible to comply with it for three years of a period of three years and three months from September 4, 1940, into November, 1943. It was constructed upon the erroneous theory that the farmer debtor could lawfully be ordered to pay rent ($2850 if R. 9 be taken, or $2450 with the enigmatic "~~300~~ 100"; "~~350~~ 150"; "~~350~~ 150", if R. 10 be taken) for a period of seven years. It could not be taken piecemeal; it requires complete reconstruction in conformity with the statutory prescription in Section 75(s)(2) that the rental shall be for three years, payable semi-annually. Here was an order (as it stood on September 4, 1940), to pay $2850 if R. 9 be taken (or $2450 or $2450 plus "~~300~~ 100"; "~~350~~ 150"; "~~350~~ 150"; if R. 10 be taken), to cover seven years to be paid in twelve installments of varying amounts of $200 to $215 (or $200 to $200 plus "~~350~~ 150") in periods varying from two months to six months and averaging three and three-elevenths months!

But again it must be noted that the refusal to accord the full three year stay to the farmer debtor was **based entirely upon his failure to redeem prior to three years** and not because he did not obey the order of September 4, 1940. That is, it was based upon the ground that the time for redemption had expired. The District Court order reads:

"The court finds that the time for redemption has expired, and said debtor has failed to so redeem said lands." R. 37, folio 35.

The Appellate Court's opinion reads:

"Since the appellant failed to redeem the property by August 17, 1942, the appellee on September 18, 1942, filed its petition for an order of sale and for the appointment of a trustee therefor" . . .

"On November 21, 1942, after a hearing, the court sustained the petition of the appellee, entered an order for sale, and appointed a trustee." R. 94, middle of page.

And again it is to be noted that no hearing was ever had upon the application of September 18, 1942, as erroneously stated in the words just quoted. See entries from September 18, 1942, to October 7, 1942, inclusive, at R. 65.

The situation as to the order of September 4, 1940, is that although a petition for review was duly filed it was never certified to the judge for review of that order. The petitioner is entitled to that review.

3.

The farmer debtor's constitutional right to due process of law was violated when the order for the sale of his farm was entered without any hearing upon the issues raised by the respondent mortgage holder's application and the farmer debtor's answer to it. R. 15 to 19. R. 20 to 23.

In addition to the assumption that the bankruptcy court may alter the course of procedure prescribed in Section 75(s)(3) as to redemption by arbitrarily setting a date

short of three years at which a farmer debtor must "pay into court" the money to redeem his farm, both the bankruptcy court and the appellate court which sustained its order of sale seem to have further assumed that an application by a mortgage holder for an order to sell the farmer debtor's farm may be granted as a matter of course, *ex parte*, without a hearing.

The mortgage holder (the respondent here) filed a petition for the appointment of a trustee to sell. R. 15. It was filed on September 18, 1942, on the day when the farmer debtor's petition for the three years' stay was heard. See R. 65, entry of September 18, 1942. The farmer debtor filed his answer thereto (R. 20) one week later. R. 65, entry of September 25, 1942. No hearing was held. The court's "Special findings of Fact and Conclusions of Law" (R. 26) were filed on October 7. See R. 65, entry of October 7, 1942.

First, may it be repeated, that the granting of the application for the appointment of a trustee to sell the farm was based **solely upon the failure of the farmer debtor to redeem it before the end of the three years at a date fixed by the court whereby he was permitted to redeem by August 17, 1942.** This order of August 17 is at R. 8. The order to sell the farm is at R. 36. At R. 37, folio 35, the order reads:

> "**The Court finds that the time for redemption has expired, and said debtor has failed to so redeem said lands.** That the petition of The Ft. Recovery Banking Company of Ft. Recovery, Ohio, should be sustained, and an order of sale granted to sell said real estate at public sale, and that a trustee be appointed to sell said land, and the Court being fully advised in the premises:
>
> It Is Hereby Ordered, that Fred B. Dressel of South

Bend, Indiana, be and he is hereby appointed Trustee," . . . etc.

Second, such a drastic order, which deprives the farmer debtor of all right of redemption, contrary to *Wright* v. *Union Central,* 1940, 311 U. S. 273, was entered without that due process of law that all courts require.

In *Morgan* v. *U. S.,* 1938, 304 U. S. 1, this court continued a long history of judicial pronouncements by holding that even in an administrative proceeding which is only quasi-judicial in character, the liberty and property of citizens must be protected by fair and open hearing. In that case there was an open hearing and argument but there was no opportunity given to the person involved to examine the order before it was issued. At page 18, the court said:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them."

In *Galpin* v. *Page,* 1874, 85 U. S. (18 Wall.) 350, 368, it was said:

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

In *Holden* v. *Hardy,* 1898, 169 U. S. 366, 389, it was said:

> "It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union

may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense."

Volume 6 of Ruling Case Law, in the article on Constitutional Law, Section 442, says of due process of law:

"The essential elements of due process of law are notice, and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case. In fact, one of the most famous and perhaps the most often quoted definitions of due process of law is that of Daniel Webster in his argument in the *Dartmouth College* case, in which he declared that by due process was meant 'a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' "

Remington on Bankruptcy, in Section 27 relating to Celerity of Proceedings, says:

"While proceedings in bankruptcy may be summary, they should not be so summary as to deprive a party of those fundamental rights that belong to every citizen, among which are the rights to be advised by the demand made upon him and after being so advised, to have a reasonable time to prepare his defense and produce his witnesses."

Likewise in his Chapter on Summary Jurisdiction over the Bankruptcy Remington says in Section 2408:

"Due hearing must be had, and reasonable opportunity therefor is requisite."

In support of the foregoing statements, Remington quotes at length from three opinions: (1) *In re Rosser*, 101 Fed. 106; (2) *Boyd* v. *Glucklich*, 116 Fed. 131; and (3) *In re Frank*, 182 Fed. 794.

1. In re Rosser.

The first case, cited and quoted by Remington, is *In re Rosser,* 101 Fed. 106, which involved an order upon a bankrupt to turn over $2,500 to the trustee. This order was issued after the examination of the bankrupt at the first creditors' meeting of which he had notice. The bankrupt being committed to jail for failure to obey the order, objected that he had not been notified that the turnover order was to be a subject of consideration at the creditor's meeting. In its decision the Circuit Court of Appeals said:

> "Such a proceeding lacks every element of due process of law. It contains no notice to the party affected of the claim against him, or of the proposed action upon it, no opportunity to contest the questions of fact which it presents by the cross examination of the claimant's witnesses or the presentation of his own, and no chance to be heard upon the question of law which it involved. It considers without notice, condemns without hearing, and renders judgment without trial. The order of the referee was unlawful and void."

2. Boyd v. Glucklich.

The second opinion which Remington quotes is *Boyd* v. *Glucklich,* 116 Fed. 131.

That opinion said:

> "It will be observed that the application of the trustee was not for an order of the bankrupt to show cause, upon reasonable notice, why he should not be required to turn over to the trustee the money and property mentioned in the application, but was for an immediate and unconditional order to be then made, based on the general and desultory examination of the bankrupt which had just been concluded."
>
> . . .
>
> "Dispatch in judicial proceedings is commendable,

but, in proceedings involving the liberty of a citizen, he has a right not only to be informed of the precise claim against him, but, after receiving that information, he has a right to a reasonable time to prepare his answer and present his proofs, and, lastly, to be heard by counsel on the law and facts of the case. While proceedings in bankruptcy may be summary, they should not be too summary; in other words, they should not be so summary as to deprive the bankrupt of those fundamental rights and privileges that belong to every citizen, among which are the right to be advised, to have a reasonable time to prepare his defense and produce his witnesses. The Bankrupt Act does not do away with these rights, and no citizen forfeits them by being adjudged a bankrupt."

3. In re Frank.

The third opinion quoted by Remington is that of *In re Frank*, 182 Fed. 794, where the bankrupt was given two days notice of a hearing which resulted in an order upon him. The Circuit Court of Appeals held that the order was void for want of adequate notice.

These three decisions were based upon *Galpin* v. *Page*, 85 U. S. (18 Wall.) 350, which has been quoted at page 46 of this brief.

CONCLUSION.

There is no authority to compel a farmer debtor to redeem his property prior to the end of three years of his statutory stay on the ground that the court, by his consent, has ordered that he be permitted to redeem before that time. When a party's petition for review is duly filed he

is entitled to have it presented to the judge and heard, and the failure of the officer of the court to execute his statutory duty to present the petition for review to the judge may not lawfully be visited on the petitioner. It is unlawful to order a farmer debtor's property sold in such a situation and especially so without hearing of an application by the mortgage holder to have the property sold.

The decisions below are contrary to the statute. They conflict with the decisions of this court, one of which reversed the same circuit. They conflict with the decision of two other circuits. They adjudicate a statutory provision which ought to be, but has not been, construed by this court.

Wherefore the petitioner prays for a writ of certiorari to the Seventh Circuit Court of Appeals.

Respectfully submitted,

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Lima, Ohio
July 7, 1943